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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-977

VIRGIL R. JOBE, M.D.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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VIRGIL R. JOBE, M.D.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Virgil R. Jobe, M.D., prays that a Writ of Certiorari issue to the United States Court of Appeals, Tenth Circuit, to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit of November 7, 1973, affirming the judgment of conviction on petitioner's indictment in the United States District Court for the Western District of Oklahoma. Rehearing denied November 27, 1973.

OPINION BELOW

The judgment of the Trial Court is printed as Appendix A. The opinion of the United States Court of Appeals Tenth Circuit is not officially reported and is printed as Exhibit B.

The Order denying the Petition for Rehearing is printed as Appendix C.

JURISDICTION

The opinion of the United States Court of Appeals, Tenth Circuit was entered on November 7, 1973 (Appendix B); a Petition for Rehearing was filed November 21, 1973, and denied November 27, 1973 (Appendix C). The jurisdiction of this Court is invoked under Title 28 U.S.C.A. §1254(1) and Rule 19 of the Rules of the Supreme Court of the United States.

The constitutional and federal questions were timely raised in the Trial Court and raised in the United States Court of Appeals, Tenth Circuit.

QUESTIONS PRESENTED

Title 21 U.S.C. §841(a)(1) is vague, indefinite, unclear, and fails to state a crime: the enforcement thereof is in violation of the rights of the petitioner Jobe guaranteed by the Fifth Amendment to the Constitution of the United States.

The Trial Court's refusal to transfer this case and trial because of prior adverse publicity violated the constitutional rights of petitioner Jobe and denied the petitioner Jobe a fair and impartial trial.

When law enforcement officers using false names and identities make repeated visits, under false pretenses to build an "air tight" case and a tactical advantage over the accused, rather than to obtain evidence for prosecution, such acts constitute entrapment as a matter of law.

Such acts as a matter of law violated the constitutional and statutory rights of the petitioner Jobe in that said acts show the focus of the investigation centered on the petitioner Jobe, was accusatory in nature and the petitioner Jobe should have been given the constitutional warnings.

Admission of evidence gained by such accusatory investigation violated the constitutional rights of the petitioner Jobe.

Rule 30, Rules of the United States District Court for the Western District of Oklahoma (40 counties of Oklahoma) promulgated under the Jury Selection Service Act of 1968, on its face denies the defendant his constitutional jury as all cases involving a crime are filed in Oklahoma City, Oklahoma.

STATUTES, FEDERAL REGULATIONS AND CONSTITUTION INVOLVED

The Constitution of the United States, Fifth Amendment:

> "No person shall be deprived of life, liberty or property without due process of law."

Title 21 U.S.C. §§802, 821, 822, 823, 827, 829, 841(a)(1).

STATEMENT

Petitioner Jobe is a practicing physician and surgeon with thirty-six (36) years of practice in Oklahoma City.

During the period of October 24, 1972, to November 7, 1972, approximately seven (7) law enforcement officers pursuant to orders and an organized plan disguised their appearances, utilized aliases, false identification (such as other Oklahoma drivers' licenses) wore civilian clothes, went to petitioner Jobe's medical clinic and by false misrepresentation obtained prescriptions from petitioner Jobe, for controlled substances. The agents feigned illnesses, pretended weight control and other medical problems, to falsely obtain prescriptions from petitioner Jobe. The

prescriptions issued as a result of the consultation were in most instances written to fictitious names given by the policemen to the petitioner Jobe by each police officer who then presented the prescriptions to a drug shop for filling, knowing the prescriptions were obtained and written under these false circumstances. The prescriptions were filled.

At the time of the alleged violations of the nineteen (19) counts of the indictment (all alleged violations of Title 21 U.S.C. §841(a)(1) petitioner Jobe was a licensed, practicing physician and surgeon. Petitioner Jobe was licensed by the United States Government to write prescriptions for controlled substances.

The evidence obtained by false pretenses was presented to a Federal Grand Jury and petitioner Jobe was indicted. Pretrial motions for copies of Grand Jury Minutes developed that testimony and other evidence before the Grand Jury were not available as minutes of the Grand Jury were not made. Timely motions were presented to dismiss the indictment for two (2) primary reasons: (1) The indictment was vague and indefinite; (2) The Statute under which the defendant was charged was vague and indefinite. A Motion to transfer the case to another district because of adverse, unfair and vicious pre-trial publicity (newspaper and TV broadcasts) prevented the appellant Jobe from obtaining a fair and impartial trial, all supported by affidavits. The manner and method of Jury selection as violating Federal Statutes was presented. All of petitioner Jobe's pre-trial motions were overruled.

Petitioner Jobe appeals from a conviction of nineteen separate counts by indictment in the Western District of Oklahoma (Vol. I, pg. 1). The indictment alleged violation of Title 21 U.S.C. §841(a)(1).

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals, Tenth Circuit, should not be left undisturbed and it is imperative that this Court correct the errors involved for several reasons, any of which qualify for review by this Court, and when taken together show a definite need for this Court's attention and supervision.

2. The decision of the United States Court of Appeals, Tenth Circuit, in this case allowing the United States Government to prosecute an individual under the provisions of Title 21 U.S.C.A. §841(a)(1) and the applicable regulations when such regulations are vague, indefinite and unclear is repugnant to and in conflict with the Fifth Amendment to the Constitution of the United States.

3. The decision of the Court of Appeals, Tenth Circuit, is repugnant to and in conflict with the decisions of the Supreme Court of the United States.

4. The acts of the governmental agency in building a case against the petitioner Jobe exceeded the bounds of governmental surveillance to the extent that the acts of the government agents in building an air tight case as a matter of law violates the constitutional rights of this petitioner guaranteed to him by the Fifth Amendment to the Constitution of the United States.

5. The Trial Court's almost total reliance upon voir dire examination to determine if the defendant can obtain a fair trial because of adverse publicity is constitutionally misplaced and such reliance by a vast number of the trial courts requires this court to take jurisdiction and to reconcile the misapplications of this principle.

6. The case presents a federal question of obvious national importance in that Title 28 U.S.C.A. §841(a)(1) is constitutionally vague and indefinite and any prosecution thereunder is void.

ARGUMENT AND BRIEF OF AUTHORITIES

The questions presented and the reasons for granting the Writ will be grouped and argued under the following three propositions:

PROPOSITION ONE

Title 21 U.S.C. Section 841(a) (1) Is Unconstitutionally Vague, Indefinite, Unclear and Fails to State a Crime: the Enforcement Thereof Is in Violation of the Rights of the Petitioner Jobe Guaranteed by the Fifth Amendment of the Constitution of the United States.

The petitioner Jobe may not be required at the peril of his liberty and property to speculate as to the meaning of Statutes which are penal in nature. Each citizen is entitled to be informed as to what the State commands or forbids.

The Controlled Substances Act of 1970 as it affects the petitioner Jobe became effective in 1971. The Controlled Substances Act repealed many sections of former laws regulating the dispensing, distribution and possession of controlled substances by physicians. These prior Statutes specifically set out the conduct required of a physician.

We submit the Act under which Jobe was charged, Title 21 U.S.C.A. §§801 et seq. is so vague and ambiguous that it fails to state a crime as alleged in the indictment of petitioner Jobe, to-wit: "Knowingly unlawfully and intentionally distribute and cause to be distributed a Schedule II Controlled substance." Congress has failed to set out in clear language the standard of conduct so as to meet the constitutional test of due process. Title 21 U.S.C.A. §841(a) provides:

> "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

> * * * to manufacture or distribute a controlled substance."

Based upon Title 21 U.S.C.A. §841(a)(1) and the averments of the indictment, the authority or lack of authority, if any, of Jobe to distribute and/or dispense controlled substances must be found in the subchapter "control and enforcement." This Statute makes it exceedingly easy for the Government to allege a violation of Title 21 U.S.C.A. §841(a)(1) but difficult for a physician with a permit to write prescriptions for controlled substances, to determine what acts he has committed which constitute a crime. The general terms of the Statute under which Jobe was charged do not make it a crime for a doctor who is registered under the Act to distribute a controlled substance by prescription.

The petitioner Jobe filed various motions attempting to discover just what acts of misconduct with which he was charged. Not until the opening statement of Government counsel was it revealed to Jobe that the Government charged Jobe with distributing or dispensing controlled substances, *not* in the course of his professional practice. The thrust of the Government's case was further crystalized in Instruction #8 (Vol. I, pg. 6):

> "You are further instructed that under the law a physician is authorized to distribute and dispense controlled substances in the court of his professional practice. Before you would be authorized to find the defendant guilty of the charge or charges against him, you must find from the evidence beyond a reasonable doubt that he did distribute or dispense controlled substances, but not in the course of his professional practice.
>
> A physician is not legally authorized to distribute or prescribe controlled substances merely to enable a per-

son to satisfy his appetite or craving, and not for treatment. What constitutes legally authorized medical practice by a physician dispensing controlled substances must be determined by you upon consideration of the evidence and attending circumstances."

If this is the law as the Government contends and the Court so instructed it must be found in Title 21 U.S.C.A. §801 et seq.

Petitioner respectfully submits Subchapter One does not state an offense. As we read the Statute the physician's authority is not limited. In prior Statutes regulating physicians the Congress was consistent in its enactment concerning physicians but not definite in the present law.

The Statutes applicable to physicians prior to the Controlled Substance Act were in the Food & Drug Act and the Internal Revenue Laws. Each of the prior laws contained a limitation reference to distribution, dispensing and possession of narcotics and drugs which limitation was in substance, "while acting in the course of their professional practice or legitimate medical uses." The following is an analysis of the repealed Statutes containing a reference to professional practice and the present Statutes which are obviously void of any reference to a limitation of professional practice.

PREVIOUS SECTION	PRESENT LAW
Title 26 U.S.C.A. §4704	Title 21 U.S.C.A. §825-829
Title 26 U.S.C.A. §4705	Title 21 U.S.C.A. §828, 829
Title 26 U.S.C.A. §4721	Title 21 U.S.C.A. §822-823
Title 26 U.S.C.A. §4722	Title 21 U.S.C.A. §822-823
Title 26 U.S.C.A. §4751	Title 21 U.S.C.A. §823
Title 26 U.S.C.A. §4755	Title 21 U.S.C.A. §822, 823

Title 21 U.S.C.A. §821 grants the Attorney General the authority to promulgate rules and regulations relating to the registration and control of the manufacture, distribution and dispensing of controlled substances. Title 21 U.S.C.A. §822 sets out the persons required to register:

> "every person who manufactures, distributes, or dispenses any controlled substance or who proposes to engage in the manufacture, distribution, or dispensing of any controlled substance, shall obtain annually a registration issued by the Attorney General in accordance with the rules and regulations promulgated by him."

Subsection B sets out the authorized activity as follows:

> "Persons registered by the Attorney General under this Subchapter to manufacture, distribute or dispense controlled substances are authorized to possess, manufacture, distribute, or dispense such substances including any such activity in the conduct of research to the extent authorized by their registration and in conformity with the other provisions of this Subchapter."

Title 21 U.S.C.A. §822 sets out the authorized activities applicable to the petitioner Jobe: "a registrant may dispense controlled substances to the extent authorized by his registration and in conformity with the other provisions of this chapter." The petitioner Jobe, as the Government's case developed, was accused of dispensing controlled substances in violation of his authority to-wit "not in the course of his professional practice." The only reference in the Statute to professional practice is that contained in the definitions of Title 21 U.S.C.A. §802:

> "(20) the term practitioner means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise

permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis, a controlled substance in the course of professional practice or research."

These Sections merely define the term practitioner and do not limit his authority to dispense a controlled substance. Title 21 U.S.C.A. §822 gives the physician the authority to dispense controlled substances to the extent authorized by his registration and in conformity with the other provisions of this Subchapter. There are no other provisions of Subchapter One (1) Title 21 U.S.C.A. §801, et seq. regulating the authority of a practitioner to dispense controlled substances.

Next we examine the registration of the petitioner Jobe to determine if he has exceeded his authority to dispense controlled substances by virtue of his registration. The authority must be limited in some respect, otherwise it must be considered as an authorized act, an act excluded under the penal provisions of Title 21 U.S.C.A. §841(a)(1) "except as authorized by this Subchapter." The regulations promulgated by the Attorney General in the application for registration and the registration contain no reference or limitation on the physician. We submit the petitioner Jobe did not exceed his authority and there is no violation of Title 21 U.S.C.A. §841(a)(1) involved in this case.

No one is required to speculate as to the meaning of penal statutes and is entitled to be informed as to what the U.S. commands or forbids: *Lanzetta* v. *State of New Jersey*, 306 U.S. 451, 59 S.Ct. 618; *Palmer* v. *City of Euclid*, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971);

Coates v. *City of Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *Smith* v. *Florida*, 405 U.S. 172, 92 S.Ct. 848, 31 L.Ed.2d 122 (1972); *Rabe* v. *Washington*, 405 U.S. 313, 92 S.Ct. 993, 31 L.Ed.2d 258 (1972).

The United States Court of Appeals, Tenth Circuit, in its opinion (Appendix B) held the Statute is not a model of clarity. The United States Court of Appeals, Tenth Circuit, relied on its opinion in *U. S.* v. *Bartee*, 479 F.2d 484 to affirm the conviction of Jobe. In *Bartee* the appellant did not raise the constitutional question and only objected to the sufficiency of the evidence. The conduct prohibited by the Act is all inclusive (Title 21 U.S.C.A. §841(a)(1)), and only by exception in other parties may certain conduct be permitted. The vagueness of the Statute is encountered when attempting to ascertain the conduct permitted by the Act. The conduct permitted under the Act and the applicable regulations is so vague and so imprecise of definition that a person is unable to determine the conduct in which he may engage as a registrant. The failure to establish a standard of permitted conduct portions of which may subsequently be prohibited conduct is in conflict with the requirement of due process. Due process of law is violated by a statute which requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

We submit Congress has not made it a crime to dispense a controlled substance pursuant to a prescription by a registrant. Whether this is by oversight or intention is not material. A citizen's road to incarceration should not be paved with the intentions of Congress unless that intention is clear and definite.

The Court in overruling the Motion for Bill of Particulars further compounded the difficulty of the defense of the case in view of the allegations in the indictment. The names of the individuals in a majority of the alleged violations set out in the indictment did not bear any relation to the names used at the time of the alleged offense. An example of this is Count I (Vol. I, pg. 1). Ray Clark is alleged to have purchased certain controlled substances on October 24, 1972. Yet when Clark testified he stated he obtained the prescription under the name of "Hank Neal" (Vol. III, pgs. 20, 22). In preparation for trial it would be logical to look for a record of Ray Clark on October 24, 1972, which would lead to nothing as the officer used the name of "Hank Neal."

The vagueness of the statute, the vagueness of the indictment and the variance in proof from the indictment show the petitioner Jobe did not receive the fair trial to which he was entitled.

PROPOSITION TWO

The Trial Court's Refusal to Transfer This Case and Trial Because of Prior Adverse Publicity Violated the Constitutional Rights of Petitioner Jobe and Denied the Petitioner Jobe a Fair and Impartial Trial.

The Trial Court denied the Motion to Transfer this case under Rule 21 F.R.Crim.P. The Trial Court's refusal to transfer this case and trial because of prior adverse publicity both before and during trial by the news media violated the constitutional rights of petitioner Jobe and denied him a fair and impartial trial.

The idea of a fair trial (including the trial jury) is coincident with the origins of the law itself. Inherent in the idea of fair play is the fundamental concept that

the jury be free from outside prejudicial and inflammatory pre-trial information and influence.

Mr. Justice Holmes states: "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson* v. *Colorado*, 205 U.S. 454, 464 (1907).

The petitioner Jobe filed a Motion to Transfer pursuant to Rule 21 F.R.Crim.P. with 14 supporting affidavits from citizens of credibility and knowledgeable of the unfair and prejudicial publicity which had saturated the citizens of the Oklahoma City area (Vol. I, pg. 31). No counter-affidavits were filed by the Government. The Motion was denied (Vol. I, pg. 54). No individual can receive a fair trial if before the trial is held the minds of the jury may have been influenced or inflamed by one-sided, incomplete, prejudicial or unfair publicity.

There are newspaper articles concerning various matters material to this case in petitioner Jobe's Physical Exc. (Vol. II). It is not possible for petitioner Jobe to say how many radio and television broadcasts reached the public by way of the seven radio stations in Oklahoma City, three television stations in Oklahoma City and the other radio stations in the State of Oklahoma. The Oklahoma City area was completely saturated by hostile, unfair, inflammatory and prejudicial pre-trial publicity.

The series of events which occurred prior to trial and which were the subject matter of the publicity as shown by the newspaper articles in Exhibits Vol. II are:

1. The indictment of petitioner Jobe.
2. The arraignment.

3. Petitioner Jobe in handcuffs with officers on street.

4. The newspaper articles of other case against petitioner Jobe which was on appeal to Court of Criminal Appeals.

5. References and articles concerning that case.

The very nature of the matter resulted in repetitive newspaper coverage, radio and television coverage, all depicting petitioner Jobe as a notorious abortionist. This publicity could have no other effect than cause shock and prejudice against petitioner Jobe.

The trial of the petitioner immediately followed all these repetitive statements of his prior cases, which were all vacated, and in the minds of the public, the petitioner was guilty of all 19 counts before the jury was called to the box.

In addition to the newspaper articles, it affirmatively appeared by affidavits that continuous television broadcasts and radio broadcasts concerned purported evidence which would be introduced in this trial. The newspaper publicity in itself was adverse when it is considered that The Daily Oklahoman, The Oklahoma City Times and The Oklahoma Journal are all daily papers with a combined circulation of over one-half million issues. The coverage of the three (3) television stations in Oklahoma City and the metropolitan radio stations reach several hundred thousand people daily. The newspapers of the smaller communities and the weekly publications throughout the State of Oklahoma, carried newspaper stories comparable to the metropolitan press but in a condensed form. It can be seen that the public newspaper, television and radio broadcasts of the key evidence introduced by the Government in the Jobe trial had been planted in the public mind prior to the commencement of the trial in this case. The

petitioner's voice of innocence and his constitutional rights of presumption of innocence could not be heard against all the newspaper, radio and television publicity.

Crime reporting that is heavily weighted against the defendant is a difficult problem to eradicate, because the press has a stake in the present system. The press is under compulsions of its own. There is, first of all, purely commercial interest in purveying crime news, for nothing sells stories as much as a sensational case.

The task of determining the effect of pre-trial publicity is difficult to say the least, however it seems an almost impossible burden has been placed on the defendant to support his application for a transfer. We submit the following examples as instances to which we refer:

1. The news media made innumerable comments about the defendant's past convictions (admittedly public records) as in this case where comments were made in the newspapers, yet the courts scrupulously keep this type of information from the ears of the jury until such time as defendant takes the stand in his own defense or in those rare circumstances where evidence of other crimes is admissable in proving the elements of the prosecution's case.

2. In this case a juror admitted discussing prior appeals of petitioner Jobe in the jury room prior to the opening of the case.

3. The photograph of petitioner Jobe in handcuffs being taken to the United States Courthouse after indictment could only be designed to inflame the minds of the public as petitioner Jobe had been charged in other cases and had made all his appearances when scheduled.

4. The total disregard of affidavits by the Trial Court in denying the Motion to Transfer of petitioner Jobe.

The cavalier announcement by a prospective juror that no amount of pre-trial publicity will enter into his deliberations seems to be the prevailing test in determining the effect of pre-trial publicity.

The case of *Estes* v. *State of Texas*, 381 U.S. 532, was set aside even though a change of venue was granted upon the ground the press coverage in the state court of Texas made the proceeding inherently lacking in due process and it was not necessary to show actual prejudice. While the Estes trial involved primarily the televising of the pre-trial proceedings we submit that in this case the saturation by newspapers, television telecasts and radio broadcasts, as set forth herein, created such an antagonistic and prejudicial atmosphere that all of the court proceedings herein are inherently lacking of due process.

The sure cure for pre-trial prejudicial publicity and trial publicity is for judges to remove and transfer the case to another district so the case will not be prejudged by prejudicial outside interference, *Sheppard* v. *Maxwell*, 384 U.S. 333 at 362, 16 L.Ed.2d 600, 620, 86 S.Ct. 1507.

In some cases it is difficult to determine when publicity crosses the boundary from mere news or prejudicial news; however, such is not the case here. In the atmosphere the trial of this case, petitioner Jobe was guilty of the crime of committing an abortion wherein the woman died and in the minds of the entire population of Oklahoma. It was reversible error not to grant him a transfer of the case under Rule 21 F.R.C.P. The correctness of the decision in Dr. Sam Sheppard's case is demonstrated by his acquittal in November, 1966, where no prejudicial newsprint existed.

In the matter of a transfer to another district on the ground of prejudice against the defendant the trial

court is vested with a large discretion; See *Bianchi* v. *U. S.*, C.A. Mo. 1955, 219 F.2d 182. In *U. S.* v. *Campbell*, C.A. S.C. 1963, 316 F.2d 7, the Court holds that the defendant was entitled to be tried in an atmosphere in which he would receive full benefit of presumption of innocence.

Title 28 U.S.C.A. §1861 declares the policy of the United States with reference to jury trials:

> "It is the policy of the United States that all litigants in Federal Courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."

In the Western District containing 40 counties there are four divisions wherein a Master Jury Box is maintained; they are:

1. Oklahoma City, Guthrie, Shawnee, Chickasha and Pauls Valley Division.
2. Enid-Ponca City Division.
3. Lawton-Mangum Division.
4. Woodward Division.

Each division maintains a qualified jury wheel from which the petit jurors are selected to try criminal cases. The qualified jurors in one division do not sit on juries in other divisions. This effectively excludes all persons from an Oklahoma City petit jury who do not reside in the

following counties: Blaine, Canadian, Cleveland, Garvin, Grady, Kingfisher, Lincoln, Logan, McClain, Oklahoma and Pottawatomie counties.

Jobe in his motion to transfer included a Motion to Transfer within the District pursuant to Rule 18 F.R.Crim.P. This Motion was also overruled. We do not contend the plan set out in Rule 30, Rules of the U.S.D.C., Western District of Oklahoma, is inherently unconstitutional, however we do say the application of Rule 30 does deny petitioner Jobe his right to a fair trial by a cross-section of jurors from the District.

We respectfully submit the record shows this petitioner did not have that fair and impartial trial guaranteed by the Constitution by the multiple errors of the trial judge and the scales of justice were tilted against the petitioner and resulted in his conviction by a jury selected from the metropolitan eleven counties instead of forty counties in the Western District.

PROPOSITION THREE

When Law Enforcement Officers Using False Names and Identities Make Repeated Visits, under False Pretenses to Build an "Air Tight" Case and a Tactical Advantage Over the Accused, Rather Than to Obtain Evidence for Prosecution, Such Acts Constitute Entrapment As a Matter of Law.

Such Cumulative Acts As a Matter of Law Violated the Constitutional and Statutory Rights of the Petitioner Jobe in That Said Acts Deny Due Process To the Petitioner Jobe.

Due Process

There is no evidence of a predisposition of petitioner Jobe to commit the offenses which were induced by agents. The detectives and other police officers by prearrangement formulated their conspiracy to enter the clinic operated by petitioner Jobe and procure prescriptions from him by (1) Use of a false and fraudulent statement to the physician that they needed the prescriptions for various ailments; (2) Used and assumed names other than their own, dressed in what might be termed truck drivers' or other common laborers' clothing; (3) Utilized false and fictitious chauffeurs' licenses which they had procured in the State of Oklahoma or the chauffeurs' license of a deceased person. All the government's witnesses themselves committed felonies under both the federal and the state laws. The Federal Act, Title 21 U.S.C.A. Section 843 prohibited acts:

> (a) "It shall be unlawful for any person to knowingly or intentionally;
>
> (3) to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge;
>
> (4) to furnish false or fraudulent material information in, or omit any material information from, any application, report, record, or other document required to be made, kept, or filed under this subchapter ..."

The penalties as shown in paragraph (3) for said acts "any person who violates this section shall be sentenced to a term of imprisonment of not more than four years, a fine of not more than $30,000.00 or both."

The Oklahoma Act, Title 63 O.S.A. §2-406 creates an offense:

(a) It shall be unlawful for any registrant knowingly or intentionally;

(3) to acquire or obtain possession of a controlled dangerous substance by misrepresentation, fraud, forgery, subterfuge;

(4) to furnish false or fraudulent material information in or omit any material information from, any application, report or other documents required to be made, kept, or filed under this act.

The penalty as prescribed in section B is a felony punishable by imprisonment of not more than 20 years or a fine of not more than $25,000.00 or both.

The next section of the Oklahoma Act being Title 63 O.S.A. §2-407 prohibited acts and penalties.

(a) No person shall obtain or attempt to obtain a controlled dangerous substance or attempt to procure the administration of a controlled dangerous substance; (1) by fraud, deceit, misrepresentation, or subterfuge; * * *

(3) by concealment of a material fact; or

(4) by the use of a false name or the giving of a false address;

(b) information communicated to a physician in an effort unlawfully to procure a controlled dangerous substance or unlawfully to procure the administration of any such drug shall not be deemed a privileged communciation.

(c) any person who violates this section is guilty of a felony punishable by imprisonment of not more than 10 years and a second subsequent offense is a felony punishable by imprisonment of not less than 4 nor more than 20 years.

The prosecuting disguised officers committed more felonies than petitioner Jobe is charged with. They went outside the law to commit these felonies and the Courts should not sanction their actions.

The Due Process clause of the 5th Amendment to the Constitution provides:

> "nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. * * *"

"Due process of law" as contained in the 5th and 14th amendment to the Constitution has been discussed by this Court in *Stanley* v. *Illinois*, 92 S.Ct. 1208, 405 U.S. 645, 31 L.Ed.2d 551 at p. 561;

> "But the Constitution recognizes higher values than speed and efficiency. Indeed, one might (P. 562) fairly say of the Bill of Rights in general, and the Due Process clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones."

Fairness of procedure is due process in the primary sense and a fair trial in a fair tribunal is a basic requirement of due process. *Fitzgerald* v. *Hampton*, 467 F.2d 755, 152 U.S. App. D.C. 1, stay granted 93 S.Ct. 549, 409 U.S. 1055, 34 L.Ed.2d 509. Essentially the rule of due process is one of fairness under circumstances and demands a balancing of interest of individual with those of state. The rights of petitioner Jobe must be balanced with the demands of the public. There is no question the government set out to build an "air tight" case against the "petitioner" when viewed in the light of other "entrapment" cases.

This case far exceeds the bounds of gathering evidence for a prosecution.

We call the Court's attention to the fact that when this type of investigation is made against a defendant before he is informed against or in order to collect evidence to build an airtight case as was done in this case that certainly it deprives the defendant, Dr. Virgil R. Jobe, of "due process of law."

The cumulative effect of the evidence of the undercover work of the Government's witnesses using deceptive names, identities and feigning requirements to obtain written prescriptions from petitioner Jobe; the adverse publicity and permitting introduction of the prescriptions written by petitioner Jobe to the persons named therein which were not the names of the patients listed and contained in the Indictments all contributed to deny petitioner Jobe a fair trial.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that the Petition for a Writ of Certiorari to the Court of Appeals, Tenth Circuit, should be granted.

LESLIE L. CONNER
JAMES M. LITTLE
LESLIE L. CONNER, JR.
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December 21, 1973

APPENDIX

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

No. 72-286 Criminal

United States of America
v.
Virgil R. Jobe, M. D.

(Filed February 8, 1973)

On this 8th day of February, 1973 came the attorney for the government and the defendant appeared in person and[1] by his attorneys, O. A. Cargill, Jr., and Leslie L. Conner, Esq.

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty and a verdict of guilty has been convicted of the offense of violation of Title 21, U.S.C., Section 841(a)(1) (distributing controlled substances unlawfully) as charged in the 19 Counts of the Indictment. And the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] three (3) years on Count 1 of the Indictment, or until the defendant is otherwise discharged as provided by law and that the defendant pay unto the United States the sum of Three

Thousand Dollars ($3,000.00), a fine on Count 1 of the Indictment, as provided by law.

IT IS FURTHER ORDERED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for impresonment for a period of three (3) years on each of Counts 2 through 19 inclusive and that said sentence imposed herein is to run concurrently with sentence imposed in Count 1 of the Indictment.

IT IS FURTHER ORDERED that the defendant remain free on his present bond pending appeal.

It Is Adjudged that[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to[6]

/s/ Luther Bohanon
United States District Judge
Rex B. Hawks, Clerk
By /s/ S. J. Bailey, Deputy Clerk

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1. Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required. [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

APPENDIX B

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

SEPTEMBER TERM 1973

No. 73-1298

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VIRGIL R. JOBE, M. D.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA
(No. CR-72-286)

(Filed November 7, 1973)

Floy E. Dawson, Assistant U. S. Attorney, Oklahoma City, Oklahoma (William R. Burkett, U. S. Attorney, Oklahoma City, Oklahoma, with him on the brief), for Plaintiff-Apellee.

Leslie L. Conner and James M. Little, Oklahoma City, Oklahoma (Leslie L. Conner, Jr. and O. A. Cargill, Jr., Oklahoma City, Oklahoma, with them on the brief), for Defendant-Appellant.

Before PICKETT, BREITENSTEIN and BARRETT, Circuit Judges.

PICKETT, Circuit Judge.

Appellant Jobe, a duly licensed and practicing medical doctor in Oklahoma City, Oklahoma, appeals from a conviction on a nineteen count indictment charging him with distributing and causing to be distributed controlled substances (narcotics) in violation of 21 U.S.C. § 841(a)(1) (1970). The charges arose out of nineteen separate prescriptions issued to a number of undercover police officers for drugs admitted to be "controlled substances" within the meaning of the statute. Dr. Jobe contends (1) that the statute under which he is charged is vague, indefinite, unclear, and fails to define the acts alleged in the indictment to be a crime; (2) that the court erred, because of local prior adverse publicity, in not granting a change of venue; (3) that the law officers in their zeal to obtain evidence of narcotics violations were guilty of entrapment; and (4) that the method for selection of jurors for the trial of criminal cases filed in Oklahoma City, Oklahoma, denies a defendant a constitutional jury.

Dr. Jobe, at the time of his arrest, was a long-time general practitioner in Oklahoma City, Oklahoma. He testified that in recent years he had more or less confined his practice to office calls. A large percentage of his patients were those having weight problems for which, in some instances, he prescribed controlled substances.[1] The prescriptions that were the basis of the indictment were given to police officers who came to the doctor's office and requested prescriptions for various kinds of narcotics. Using fictitious names, they appeared out of uniform and were generally dressed to disguise their real identity. They were able to obtain the prescriptions within a few minutes after an interview and without any actual physical

1. The doctor testified that on some days he would see as many as 100 to 125 persons in his office.

examination. The doctor admitted writing the prescriptions and testified that they were issued in good faith and in the honest belief that they were given to persons who were in need of the drugs.

The gist of the attack upon the applicable provisions of the Act is that the general terms of the statute do not make it a crime for one registered under the Act to dispense a controlled substance through a prescription. The statute is not a model of clarity in this respect, but we decided this issue in a recent decision, United States v. Bartee, 479 F.2d 484 (10th Cir. 1973), where it was said that it is clear and inescapable "that when a medical practitioner issues a prescription which is not for a legitimate medical purpose and is not in the usual course of his professional practice, then he does violate the statute." 479 F.2d at 488. The issue of whether the prescriptions were given in the course of professional practice and for a legitimate purpose was settled by the jury verdict.

The record discloses that prior to trial there was considerable interest in the case and it was referred to quite extensively by all the news media. The coverage did not appear to be greater than usual in a case of this kind, but there was reference to some other criminal cases concerning the doctor. The trial court denied a motion for change of venue subject to a reconsideration after the voir dire examination of prospective trial jurors. At the time of trial a jury was readily selected that was acceptable to the parties. The defendant did not exhaust all of the peremptory challenges to which he was entitled. The court denied the renewed motion for change of venue. Rule 21 Fed. R. Crim. P. provides that the trial of a criminal case shall be transferred to another district "if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he

cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." The ultimate question confronting a trial judge in situations such as this is whether it is possible to select a fair and impartial jury from a jury array selected from the vicinity where the publicity occurred. United States v. Daddano, 432 F.2d 1119 (7th Cir. 1970), *cert. denied*, 402 U.S. 905 (1971); Jones v. Gasch, 404 F.2d 1231 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968). The granting of a motion for change of venue under Rule 21 is specifically within the discretion of the trial judge. United States v. Smaldone, ... F.2d ..... (10th Cir. 1973); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1967); Dennis v. United States, 302 F.2d 5 (10th Cir. 1962). Little if any community prejudice against the doctor was encountered in the selection of the jury. We find no abuse of discretion.

It is next urged that the use of aliases and other deception by the police officers was an unlawful conspiracy. The essence of this argument is that the conduct constituted entrapment. It has often been said that in enforcing laws pertaining to vice, narcotics and similar violations, officers may employ appropriate artifice and deception to determine illicit activities. Lewis v. United States, 385 U.S. 206 (1966); Sorrells v. United States, 287 U.S. 435 (1932). When a person is shown to be ready and willing to violate the law, the providing of an opportunity therefor by undercover agents or police officers is not entrapment. Lopez v. United States, 373 U.S. 427 (1963); United States v. Crawford, 444 F.2d 1404 (10th Cir.), *cert. denied*, 404 U.S. 855 (1971); Garcia v. United States, 373 F.2d 806 (10th Cir. 1967); Maestas v. United States, 341 F.2d 493 (10th Cir. 1965).

Finally, it is urged that the conviction cannot be sustained because the jury panel was selected from a petit

jury array chosen from only one division and not from the entire Western District of Oklahoma. No objection was made prior to trial, and if there was any error in the jury selection, it was waived. Fed. R. Crim. P. 12(b)(2); Shotwell Manufacturing Co. v. United States, 371 U.S. 341 (1963); Fraizer v. United States, 335 U.S. 497 (1948). It is also argued that there was error in the cross examination of Jobe with reference to former convictions. No objection was made to the questions and they were not such as to constitute plain error or affect substantial rights of the accused. Tapia v. United States, 446 F.2d 410 (10th Cir. 1971).

AFFIRMED.

APPENDIX C

NOVEMBER TERM—NOVEMBER 27, 1973

Before Honorable John C. Pickett and Honorable Jean S. Breitenstein, Senior Circuit Judges, and Honorable James E. Barrett, Circuit Judge

No. 73-1298

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VIRGIL R. JOBE, M. D.
Defendant-Appellant.

This matter comes on for consideration of the petition for rehearing filed by the appellant.

Upon consideration whereof, the petition for rehearing is denied.

/s/ HOWARD K. PHILLIPS,
Clerk